IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JAIPUR BENCH, JAIPUR

O R D E R

S.B. Civil Second Appeal No.71 Of 2003

Kishan Chand Vesus Sobhag Mal.

Date Of Order ::: 21.11.2006.

Hon'ble Mr. Narendra Kumar Jain J.

Mr. R.K. Agarwal, Counsel for defendant-appellant
Mr. J.C. Jain, Counsel for plaintiff-respondent

By the Court :

Heard learned counsel for both the parties.

With the consent of both the parties the second appeal is being disposed off at the admission stage itself.

Following substantial question of law is involved in this second appeal :-

> **"WHETHER,** the Courts below have committed an illegality in not considering the question of partial eviction in respect of the rented

shop”?.

The plaintiff-respondent filed a suit for eviction in respect of the disputed shop in the Lower Court on the ground of default in making the payment of monthly rent as well as bona-fide necessity. The Lower Court recorded a finding that the tenant has committed a default in making the payment of rent, but the decree of eviction was not passed as the benefit of Section 13 (6) of the Rajasthan Premises (Control of Rent & Eviction) Act, 1950 was given. So far as the bona-fide necessity is concerned, the Lower court recorded a finding that the plaintiff has failed to prove the necessity of the rented shop. The Lower Court dismissed the suit. Being aggrieved with the same an appeal was filed by the landlord. The First Appellate Court reversed the finding of the Lower court in respect of issue relating to bonafide necessity of the rented shop and consequently decreed the suit of the plaintiff-respondents.

Learned counsel for both the parties admit that the issue in respect of partial eviction of the rented shop has not been framed and no evidence was

recorded on that issue. Therefore, both the Courts below have not recorded any finding in respect of partial eviction. Learned counsel for both the parties agree that the case may be remitted back to the First Appellate Court with a direction to frame an issue in respect of partial eviction in the matter and allow both the parties to lead the evidence on that issue and thereafter decide the first appeal afresh.

I have considered the submissions of learned counsel for both the parties and after considering their submissions, I find that question of partial eviction has not been considered in the case. It was a duty of the Courts below to consider the question of partial eviction in respect of the rented shop. Learned counsel for both the parties have not disputed that no issue was framed in this regard, nor any evidence was led by both the parties, therefore, no finding was recorded by the Courts below. In these circumstances, I set aside the judgment and decree passed by the First Appellate court and remand the matter back to the First Appellate Court for the said purpose.

Consequently, the second appeal is allowed. The judgment and decree dated 28.10.2002 passed by the

Additional District & Sessions Judge,No.3, Ajmer in Civil Appeal No.87/2002 is set aside and the case is remitted back to the Additional District & Sessions Judge No.3 Ajmer with a direction to frame an issue in respect of partial eviction in the matter and allow both the parties to lead the evidence on that issue and thereafter decide the first appeal afresh. Both the parties are directed to appear before the Additional District & Sessions Judge No.3, Ajmer on 15.12.2006. The First Appellate Court is directed to do the needful in the matter and decide the appeal within a period of four months from 15.12.2006.

Learned counsel for the plaintiff-respondent Mr. J.C. Jain, contended that the post of Additional District & Sessions Judge No.3 Ajmer is lying vacant for last about six months, therefore, it will be appropriate to direct some other Court in place of Additional District & Sessions Judge No.3 Ajmer to decide the appeal. Having considered his submission, I think it fit and proper to direct that in case any Presiding Officer is not posted in the Court of A.D.J. No.3, Ajmer on or before 15.12.2006, then the Office of the concerned Court shall put up the matter before the

District Judge, Ajmer who, either decide the appeal himself or may assign the same to any other competent Court immediately.

There shall be no order as to costs.

(Narendra Kumar Jain) J.